United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7295

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To be argued by
Irwin M. Berg.

United States Court of Appeals

For the Second Circuit.

CHERYL PERRY HILL, THELMA LINDO, VICTORIA RAPHAEL, LURLINE RUTHERFORD and ANSONIA LEWIS, for themselves and all persons similarly situated,

Plaintiffs-Appellants,

against

A-T-O, INC., FAMILY BUYING POWER, INC., NATIONWIDE PROMOTIONS, INC., EXECUTIVE BUYING POWER, INC., FAMILY CLEANING POWER, INC., COMPACT ASSOCIATES, INC., COMPACT BELLEROSE, INC., COMPACT ELECTRA CORP., HYMAN SINDELMAN, a/k/a HY DELMAN, M. ROBERT DORTCH and FRANK DORTCH,

Defendants-Appellees.

Brief for Defendants-Appellees, Compact Associates, Inc., Compact Bellerose, Inc., Compact Electra Corp., and Hyman Sindelman.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6078—1975

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TABLE OF CONTENTS

TABLE OF CONTENTS

Cont'd. Page

TABLES OF AUTHORITIES

Cases: Page

Cases, Cont'd. Page

STATUTES

RULES AND REGULATIONS: Page

TREATISES AND ARTICLES

UNITED STATES COURT OF APPEALS
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Defendants-Appellees.

Docket No. 75-7295

BRIEF FOR DEFENDANTS-APPELLEES

Counter Questions Presented

1. Where the alleged tying product is given away free to promote the alleged tied product, are two products involved so as to give rise to a tie-in sale.

2. In a record devoid of evidence of actual coercion and where defendants employed nothing more compelling than persuasion, can the plaintiffs prove an illegal tie-in arrangement.

3. Does an allegation of fraudulent of factual misrepresntations by the defendants in the sale of a product give rise to a violation of Section I of the Sherman Act when coupled with an allegation that other sellers of the same product could not legally compete with the defendants because of the said fraudulent mispresentations.

References To The Record

References to a page number followed by the letter "a" are to the appendix to the brief of the defendant A-T-O Inc. References to a document preceeded by the letter "I" are to documents in the original record numbered 1 through 93 by the plaintiffs and more fully described in pages A-1 through A-5 appended to their brief.

Preliminary Statement

The plaintiffs commenced a class action against the defendants on or about December 3, 1973. The plaintiffs are purchasers of a vacuum cleaner and certain attachments and the recipents of one year membership in a buying service known as The Family Power Service ("FBP"). All of the plaintiffs were solicited in their homes.

The defendant A-T-O, Inc. ("ATO") is the manufacturer of the vacuum cleaner and some of the attachments which the plaintiffs purchased.

The defendants Compact Electra Corp., Compact Associates, Inc., Compact Bellerose, Inc., Compact Discount, Inc., and Hyman Sindelman (the "Compact defendants") are the sellers from whom the plaintiffs purchased the vacuum cleaner and attachments and received the one year membership in The Family Buying Power Service ("FBP"). The Compact defendants sell almost exclusively by means of home soliticions.

The defendants Family Buying Power, Inc., Nationwide Promotions, Inc., Executive Buying Power, Inc., Family Cleaning Power, Inc,. M. Robert Dortch and Frank Dortch

(the "FBP defendants") own and operate The Family Buying Power Service ("FBP").

The plaintiffs' amended complaint contains two causes of action (16a). The first cause of action alleges a violation of Section I of the Sherman Act on account of an illegal tying arrangement. The second cause of action alleges a violation of Section I of the Sherman Act arising from a conspiracy among the defendants to use certain fraudulent selling techniques so as to foreclose competition from other sellers who do not use such techniques in the same market.

By notice of motion dated November 29, 1974 the Compact defendants moved pursuant to Rule 56 F.R.C.P. for summary judgment dismissing the plaintiffs' amended complaint and for other relief not relevant to this appeal. Thereafter the other defendants moved for summary judgment. By order dated January 21, 1975 the Court below (Bruchhausen, J.) denied the defendants' motions for summary judgment (5a).

By notice of motion dated January 31, 1975 the Compact defendants moved to reargue the order of January 21, 1975 which denied the defendants' motion for summary judgment. By memorandum dated March 5, 1975

the District Court (Bruchhausen, J.) granted leave to reargue upon the authority contained in Capital Temporaries Inc. of Hartford v. The Olsten Corp., 506 F2d 658 (2nd Cir., 1974), and upon reconsideration granted the defendants' motion for summary judgment and dismissed the plaintiffs' amended complaint(1a).

By notice of motion dated March 14, 1975 plaintiffs then moved to reargue the order dated March 5, 1975 and for leave to amend their amended complaint and their statement pursuant to Rule 9(g) of the General Rules in an attempt to correct certain deficiences found in them by Judge Burchhausen in his memorandum and order dated March 5, 1975. By memorandum and order dated April 11, 1975, Judge Bruchhausen denied the plaintiffs' motion in all respects.

By Notice of Appeal dated April 16, 1975 plaintiffs appeal from each of the orders of the District Court recited above. They appeal from:

1. the order dated January 21, 1975 which denied defendants' motion for summary judgment to the extent that said order was later modified by subsequent orders granting defendants' motions for summary judgment; and

2. the order dated March 5, 1975 which granted the defendants' motion for reargument, and upon reargument granted defendants summary judgment; and

3. the order dated April 11, 1975 which denied plaintiffs' motion for leave to reargue or amend their complaint and General Rule 9(g) statement.

The Pleadings

The plaintiffs commenced this action as a class action against the Compact defendants and the other defendants on or about December 3, 1975. The plaintiffs' complaint as amended contains two causes of action under Section I of the Sherman Act and seeks injunctive relief and treble damages under Sections 4 and 16 of the Clayton Act (16a). The first cause of action alleges an illegal tying arrangement. It is alleged that the membership in FBP may only be "purchased" by purchasing a vacuum cleaner (22a). The defendants are said to exercise "market power" through the FBP primarily by means of the effect on the plaintiffs of misrepresentations made to them concerning the plan (24a,25a).* These mispresentations are said

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* The plaintiffs also allege in their complaint that

to include:

(a) statements concerning the uniqueness, value and utility of a membership in FBP

(b) that a membership in FBP is "free"

(c) that the "free" membership is not for sale at any price and is obtainable only through the immediate purchase of a vacuum cleaner

(d) that normal use of a membership in FBP will save them many times the cost of the vacuum cleaner.

The complaint further alleges that the existence of the defendants' market power over the FBP may be inferred from the fact that the defendants have imposed the tie-in between the buying plan and the vacuum cleaner in many thousands of cases upon persons, who but for the tie, would have purchased only the membership in FBP (23a).

The second cause of action alleges a violation of Section I of the Sherman Act arising from the same mispresentations and fraudulent techniques without the

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the plan is unique and that it enjoys unstated advantages over its competition (23a). As will be shown later, the plaintiffs have not advanced a scintilla of evidence to prove either of these allegations.

allegations of a tie. It is claimed that as a result of the defendants' fraud, other sellers cannot legally compete with them in the home solicitation market and interstate trade is thereby restrained and free competition destroyed (27a, 28a).

All of the plaintiffs' material allegations have been denied by all of the defendants.

The Facts

The defendant Compact Electra Corp. ("Compact Electra") sells a home cleaning appliance system whose basic components are the Compact vacuum cleaner and floor polisher-waxer manufactured by defendant ATO (36a). Other components of the Compact home appliance system include a vibrator, hair dryer, suder-shampooer, sprayer and demother (51a). Some of these other components are manufactured by defendant Compact Associates and some by other manufacturers (36a).

Sales agents of the defendant Compact Electra visit customers and potential customers in their homes after appointments have been arranged. The sales agent offers each such customer the complete Compact home appliance system for a cash price of

of $399.95 not including sales tax. In addition the customer is offered a one(1) year membership in FBP without charge with the purchase of a Compact home cleaning system. Whether the customer wants a membership in FBP or not (and many do not), the cash price for the Compact system is the same, namely $399.95 (37a).

The Compact defendants do not sell or offer for sale a membership in FBP to anyone, at anytime, under any circumstance. They are in the business of selling vacuum cleaners and accessories alone (48a). If a customer does not wish to buy the Compact equipment, the Compact defendants will not furnish him, free of charge, a membership in FBP. The one year free membership in FBP is used by the Compact defendants as a promotional device. Such giveaway promotions are rampant throughout the American economy and are widely used as an alternative to advertising (50a).

The price at which the Compact defendants sell their equipment compares favarably with those of their competitors who are engaged in home solicition (38a). In none of their affidavits do the plaintiffs offer any evidence of the price charged by other

companies that sell the same equipment to customers at their homes.* In contrast, Exhibit E to the affidavit of Robert Limacher sworn to May 15, 1974 (73a) shows that the Compact defendants sold the ATO manufactured vacuum cleaner on a house-to-house basis cheaper than such competitors as Kirby, Rainbow, Filter Queen, Bison and Fairfax S-1. This fact is uncontested in the record.

The record shows furthermore that defendants have no actual market power over consumer buying services in the New York City Area. Among the buying services which compete with FBP are the following, all of which possess significantly greater financial resources than FBP and almost

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*Plaintiffs' brief (p. 42n11) offers as evidence of excessive selling price, only the cost of f.o.b. Anaheim California of the vacuum cleaner and one attachment. The cost of five (5) other attachments is not included; nor is the freight cost from California to New York; nor is the higher selling costs faced by home solicitation sellers.(51a, 52a). This "evidence" of excessive price is ridiculous on its face - especially in view of the unchallenged evidence in the record that the price charged is competitive.

all of which possess greater membership: Unity Buying Service, Inc., Always Buy Intelligently, Inc., United Buying Service, Inc., Peoples' Buying Service, Inc., Nationwide Purchasing, Inc., and Nationwide Wholesalers, Inc. (I-67, Dortch Affidavit, 1/3/75, §10).

One of FBP's competitors, Unity Buying Service Co. Inc., reported in December, 1971 that it had 380,000 members (I-68, Exhibit A, p. 3 and 8). According to Unity's prospectus, it "solicits individuals throughout the United States to become members of its Factory Buying Club at a current annual membership of $6.00." (I-68, Exhibit A, p.7). Unity maintains a catalogue containing over 8,500 items of merchandise, including many brand name consumer products. Members are entitled to order merchandise from the catalogue and the price that they will pay is considerably lower than the approximate suggested retail price of the supplier. Both the price paid by a member and the suppliers' suggested retail price are listed in the catalogue for each item (I-68, Exhibit A, p.7). By contrast

FBP at the same time had only 20,000 members, charged $12.00 for an annual membership and performed substantially the same service for its members (44a; I-68, §12). Another FBP Competitor, United Buying Service, has one-hundred fifty (150) times the members of FBP (51a).

Thus the defendants do not possess any actual market dominance in the buying service field. The statement in plaintiffs' brief (p.39) that FBP "was apparently the only general consumer buying service offered for sale in the New York market" is contradicted by the evidence in the record.*

The affidavits of the plaintiffs show that it is the "impression of uniqueness" that is the sole basis of their claim of defendants' market dominance over buying services in the New York Area.

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*Plaintiffs rely upon a "study" made of buying services listed in the 1973 New York Telephone Yellow Pages. This "study" does not respond to or mention the buying services listed by Frank Dortch in his affidavit (I-67), or the statistics concerning the relative sizes of FBP and Unity Buying Services, Inc., and United Buying Service, Inc. taken by Hyman Sindelman from Readers Digest (51a), or the facts taken from the prospectus of Unity Buying Service, Inc. (I-68, Exhibit A).

This "impression of uniqueness" was allegedly conveyed by the misrepresentations of the Compact sales agents in their sales presentations. As this appeal involves the granting of a motion for summary judgment, the plaintiffs' affidavits detailing the alleged mispresentations of the Compact defendants' sales agents must be accepted as true:

(a) that plaintiff Raphael was told that "tremendous savings were available to FBP members" (I-64, Affidavit Raphael, §2)

(b) that plaintiff Hill was told that "Family Buying Power would result in thousands of dollars of lifetime savings" (I-64, Affidavit Hill, §4)

(c) that plaintiff Lewis was told that "we could save lots of money by not paying the mark-ups of retail stores" and that "the salesman said that FBP was only available to people who bought the Compact vacuum cleaner, in which case it was included without charge." (I-64, Affidavit Lewis, §3 and 4*).

As a result of the "impression of uniqueness" which they gained concerning a membership in FBP, the plaintiffs claim they were persuaded to purchase

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*Plaintiffs Lindo and Rutherford do not in their affidavits allege any mispresentation or exaggeration concerning BFP by the Compact sales agent. (See I-64)

a vacuum cleaner because the Compact sales agent would not "give them one free" unless they did so.

(a) "If Family Buying Power had not been included as part of the sale, I would have not bought the Compact vacuum cleaner. When I bought the Compact, I already owned a General Electric vacuum cleaner which worked quite well...The salesman persuaded me to trade in my G.E. machine for a credit toward the price of the Compact." (Hill, I-64, §5).

(b) "He (the Compact sales agent) claimed that ...I could only get FBP membership if I bought the vacuum cleaner, in which case it would be included free...At the end of the sales presentation, I was persuaded to sign a contract for the purchase of a vacuum cleaner..(Raphael, I-64, §2 and 3).

(c) "The salesman said that FBP was only available to people who bought the Compact vacuum cleaner, in which case it was included without charge. If I could have bought FBP separately, I would have not have bought the vacuum cleaner" (Lewis, I-64, §4).

An analysis of the plaintiffs' affidavits reveals the following facts:

(a) Prior to their being called on by a Compact sales agent, none of them were aware that FBP existed.

(b) None of the plaintiffs ever made, or attempted to make, an ivestigation to determine whether a membership in FBP could be obtained through sources other than Compact Electra.

(c) None of the plaintiffs ever made, or attempted to make, an investigation to determine what buying services were available other than FBP.

(d) Only one of the plaintiffs (Lewis) attempted to ultiize the services offered by FBP.

(e) None of the plaintiffs attempted to purchase a membership in FBP either directly from FBP, without buying the vacuum cleaner.

(f) None of the plaintiffs claimed that she was "coerced" into purchasing the vacuum cleaner. Two of them in fact say that they were "persuaded" to purchase the vacuum cleaner."*

Plaintiffs' Motion to Reargue

After initially denying the defendants' motion for summary judgment, Judge Bruchhausen by order dated March 5, 1975 granted defendants leave to reargue upon the authority contained in Capital Temporaries Inc. of Hartford v. The Olsten Corporation, 506 F2d 658 (2nd Cir., 1974) and upon reconsideration granted the defendants' motion for summary judgment and dismissed the plaintiffs' amended complaint (1a). Judge Bruchhausen held that neither the plaintiffs' complaint, nor their

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*Plaintiffs Hill and Rutherford in their affidavits in support of the plaintiffs' motion for reargument do use the word "coercion" (I-84 and I-86 respectfully). As will be shown more fully later, both these affidavits were submitted in violation of General Rule 9(m) and furthermore, are not before this Court on this appeal. In addition plaintiff Hill's affidavit (I-86) directly contradicts her earlier affidavit where she said that she was "persuaded to purchase the vacuum cleaner" (I-64). Plaintiff Rutherford in one and the same affidavit says that she was both "persuaded" and "coerced" (I-86).

statement pursuant to General Rule 9(g), nor any of their affidavits alleged any coercion by the salesman who sold them. Accordingly, he dismissed the first cause of action since the plaintiffs "failed to establish actual coercion on behalf of the defendants" (4a). With respect to the second cause of action alleging fraudulent business practices, Judge Bruchhausen held that he "Anti-Trust Act" was never meant to be utilized or extended to include claims for common law fraud and deceit. See Norville v. Globe Oil and Refining Co., 303 F2d 281 and cases cited therein" (4a).

Plaintiffs then moved to reargue the order dated March 5, 1975 which granted summary judgment to the defendants and in addition for leave to amend their amended complaint and their Rule 9(g) statement. In support of their motion the plaintiffs submitted the following affidavits (I-84):

a) Affidavit of Allen R. Bentley sworn to March 14, 1975

Points I and II of this affidavit are in reality a brief in support of the plaintiffs' motion for reargument. In so far as Mr. Bentley quotes from the record his affidavit, taken as a brief, is proper. However, Mr.

Bentley also quotes from an affidavit of Cheryl Hill and from an Exhibit annexed to an affidavit of Isabel Little, both of which affidavits were submitted simultaneously with Mr. Bentley's affidavit. These affidavits were submitted contrary to Rule 9(m) of the General Rules which provides that a motion for reargument shall be served with

> "a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court overlooked. ...No affidavits shall be filed by any party unless directed by the Court."

Point III of Mr. Bentley's affidavit deals with his motion to amend the amended complaint and the Rule 9(g) statement. The purpose of his Point III is to insert liberally in the amended complaint and the Rule 9(g) statement the word "coercion". Statements in pleadings and in the Rule 9(g) statement are mere allegations and they cannot defeat a motion for summary judgment. Rule 56(e) F.R.C.P. provides:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of his pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

b) Also submitted in support of the plaintiffs' motion for reargument and for leave to amend was the affidavit of Cheryl Perry Hill sworn to March 5, 1975. As has already been stated the submission of this affidavit on a motion to reargue violates Rule 9(m) of the General Rules. Furthermore, her affidavit adds, nothing to the facts alleged in her prior affidavit except her conclusion that "the Compact company really coerced me" whereas previously she concluded that "the salesman persuaded me". (I-64, §5) This reversal in conclusion was obviously an after-thought provoked by Judge Bruchhausen's decision that none of the plaintiffs' affidavits alleged any coercion by the salesman who sold them.

c) Also submitted in support of plaintiffs' motion for reargument and for leave to amend is the affidavit of Isabel Little sworn to March 13, 1975. This affidavit contains the transcript of the sales presentation of one of the Compact sales agents. Again the affidavit and transcript violated Rule 9(m) of the General Rules. Furthermore, the transcript merely repeats allegations already contained in the plaintiffs' affidavits; namely that the Compact sales agents claimed tremendous savings were available to members of FBP and that they would not

give away the membership unless the customers purchased the equipment.

d) The final affidavit submitted in support of plaintiffs' motion to reargue is that of Lurline Rutherford sworn to March 19, 1975 (I-86). This affidavit also violates General Rule 9(m). In addition, in one and the same affidavit plaintiff Rutherford swears that she was both "persuaded" and "coerced".

> "This price (for the Compact vacuum cleaner) seemed high at the time for a vacuum cleaner, but the fact that Family Buyer Power, a unique and remarkable service, was included in the package persuaded me to buy it." (I-86, §4)

> "If the buying service had not been included as part of the sale, I would not have bought the Compact vacuum cleaner. Therefore, I believe that Family Buying Power was used to coerce me and my husband into buying the Compact vacuum cleaner....." (I-86, §5)

Plaintiff Rutherford's affidavit furthermore reinforces those of all other plaintiffs in its failure to describe a single unique feature of FBP and shows that the sole basis of the claim of an illegal tie is the "impression of uniqueness" which was received from the sales presentation.

> "At the time Mr. Reese (the Compact sales agent) came for the demonstration, and up to the present, I have never heard of any

> buying service besides Family Buying Power. The way Mr. Reese described it, Family Buying Power sounded like a unique organization that was extremely valuable. (I-86, §6) (underscoring ours)

Judge Bruchhausen, by order dated April 11, 1975 denied the plaintiffs' motion in all respects. In so doing the Court commented that "the moving papers contain no new matter, not previously presented on the prior motion, dismissing the complaint". Even if the District Court had granted the plaintiffs' motion to amend the Complaint and the Rule 9(g) statement this would not have saved them from summary judgment because "an adverse party may not rest upon mere allegations or denials in his pleadings" in the defense of such a motion. Rule 56(e) F.R.C.P.

The Record Before This Court

Although the plaintiffs' notice of appeal (I-92) recites that the plaintiffs' appeal from the Orders of the District Court dated January 21, 1975, March 5, 1975 and April 11, 1975, properly this appeal is from the Order dated March 5, 1975 alone. The Order dated March 5, 1975 granted defendants' motion to reargue the Order dated January 21, 1975 and upon reargument granted defendants summary judgment. The Order dated April 11, 1975,

as it denied plaintiffs' motion for leave to reargue the Order dated March 5, 1975, is not appealable.

This means that the record on this appeal consists of all the papers that were before the Court at the time the defendants' motion to reargue was granted. All papers submitted in support of plaintiffs' motion to reargue are dehors the record. References in plaintiffs' brief to such papers appear as follows:

Plaintiffs' Index No.	Description of Document	Page Where Appearing in Plaintiffs' Brief
I-84	Transcript of tape recording and Affidavit of Cheryl Hill	41,57,58,59,60
I-86	Affidavit of Rutherford	58

Plaintiffs' brief also makes references to their amended complaint in support of their contention that the defendants exercised market power over FBP or coerced the plaintiffs into purchasing the Compact equipment. References to allegations in a complaint do not create issues of fact so as to defeat a motion for summary judgment. These references to the complaint prove material factual allegations appear as follows:

Plaintiffs' Index No.	Description of Document	Page Where Appearing in Plaintiffs' Brief
I-60 (Exh.A) Also as I-19	Amended Complaint	8,38,40,41,45

POINT I

NO TIE-IN TRANSACTION OCCURRED BECAUSE ONLY ONE PRODUCT WAS SOLD.

Each of the plaintiffs as well as all members of the proposed class purchased a Compact home cleaning system from one of the Compact defendants. They never purchased anything, or were solicited to purchase anything, by any of the other defendants. The only direct contact the plaintiffs have with any of the defendants has been with the Compact defendants.

The Compact defendants are in the business of selling vacuum cleaners and accessories. The do not and have never sold memberships in FBP or in any other buying service. In an effort to promote the goodwill of their customers and as a promotional device, the Compact defendants give away, free of charge, a one year membership in FBP, the cost of which was $12.00. If a customer wishes to buy the Compact home cleaning system without receiving the one year free membership in FBP, no reduction is given him in the purchase price. Under these circumstances there can be no tie. Washington Gas Light Company v. Virginia Electric and Power Company, 438 F2d 248 (4th Cir., 1971); Twin City

Sportservice Inc. v. Charles D. Finley & Co., 1975 CCH Trade Cases, Sec. 60,195 (9th Cir., 1975); Forrest v. Capital Building & Loan Assn., 385 FS 831 (MD La., 1973) aff'd. 504 F2d 891 (5th Cir., 1974); Gas Light Company of Columbus v. Georgia Power Company, 313 FS 860 (MD Ga. 1970); Cities Service Oil Company v. Coleman Oil Co., 470 F2d 925 (1st Cir., 1972), cert. den. 411 US 967; Driskill v. Dallas Cowboys Football Club, Inc., 1973-1 CCH Trade Cases, Sec. 74,544 (ND Texas, 1973); United Artists Records Inc. v. Eastern Tape Corp., NC App. 207, 198 SE2d 452, 1973-2 CCH Trade Cases, Sec. 74,738 at p. 95,236.

The plaintiffs complain that a violation of the anti-trust laws arises because the Compact defendants do not sell memberships in FBP (plaintiffs' brief, p.40) or because the only time they will make a gift of membership is when the customer agrees to purchase the vacuum cleaner (plaintiffs' brief, p.8). Such "give away promotions" are alternatives to advertising. They are available at many gas stations with the purchase of a full tank. Savings banks offer a wide range of free gifts if the prospective depositer will open a new account. Many sellers provide ancillary services free

as an inducement to buy a product and often a lively competition will commence with respect to the ancillary service. One example of this is an airline which advertises a "free" meal as an inducement to the public to buy a ticket. The plaintiffs' interpretation of Section I of the Sherman Act would require all sellers either to sell separately at a separate price every item which it uses as a promotional device or to give it away free to all prospective customers whether or not they purchase the item being offered for sale. The anti-trust laws do not require Banks to go into the retail business or airlines into the restaurant business in order to promote their product. Donald Baker, Another Look At Franchise Tie-Ins After Texaco and Fortner, 14 Antitrust Bulletin 767*; Ross, The Single Product Issue in Antitrust Tying, 23 Emory Law Review 963 (1974).** Similarly, the anti-trust laws do not require the Compact defendants to offer for sale a one year membership on FBP or to give such a membership away free to all its prospective customers.

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* ".....surely no one would regard the in flight meal program as illegal tying - let alone illegal per se - on the theory that air transportation was being illegally tied to the 'free' meal." At p. 776

** "...it would be difficult to imagine a more egregious example of the tail wagging the dog." At p. 1005

The writer has found no reported case in which the Court found an illegal tying arrangement where the alleged tying product was clearly ancillary to the alleged tied product in a commercial sense. In most of these cases the Courts have held that there was no "tie-in" because there was only one product being sold.

In Washington Gas Light Company v. Virginia Electric and Power Company, supra, the defendant Power Company began in 1963 to offer underground electric lines free of charge to builders who constructed houses using only electricity. Prior to 1963 the Power Company ("VEPCO") installed underground lines if the builder paid $280.00. The Fourth Circuit held:

> "It seems to us that VEPCO sold only one product - electricity. The delivery of that product has always been an ancillary and necessary part of the business of producing and selling electrical power."

In Twin City Sportservice, Inc. v. Charles O. Finley & Co., supra, the defendant alleged that plaintiff, a food concessionaire in defendants' sports stadium, had tied advances made to defendant with its concession services. The Court held:

> "We view Sportservice as a purchaser of a concession franchise from the Athletics, the seller, in exchange for payments consisting of (1) certain loans and

> and advances and (2) a percentage of gross receipts payable throughout the life of the contract. Viewed in this manner, the sine qua non of a tying case, viz. two separate products, is lacking."

In Gas Light Company of Columbia v. Georgia Power Company, supra, the Court held:

> "Underground Residential Distribution (of electricity) is ancillary to both the seller and buyer of the product in much the same way as a free meal given to an airline passenger is ancillary to the sale of an airline ticket. Therefore, it is difficult to see how there could be a separate tying product in the commercial sense, or how such a case would be fit within the tying clause concept."

If the Court finds that the Compact defendants sold the plaintiffs only one product (viz: the Compact home cleaning equipment) then the plaintiffs' first cause of action must fail. Forrest v. Capital Building & Loan Assn., supra; Twin City Sportswear, Inc. v. Charles O. Finley & Co., supra. This result must occur even if the defendants exercised market power over membership in consumer buying services.

> "The absence of two separate products, the presence of which must exist in order to justify invoking Fortner 394 U.S. at 507, makes it unnecessary for us to review the trial court's findings that Sportservice had

sufficient economic power in the market for tying product." Twin City Sportservice Inc. v. Charles O. Finley & Co., supra.

"No two products, tying and tied, are present in this case. Only one product is sold or extended in the market place, i.e. home and commercial credit. Therefore the requirement of free competition for the tied product (legal services) becomes irrelevant." Forrest v. Capital Building Loan Assn., supra.

POINT II

THE PLAINTIFFS HAVE FAILED TO ADVANCE ANY PROOF THAT THEY WERE ACTUALLY COERCED IN MAKING A PURCHASE AND THUS THEIR FIRST CAUSE OF ACTION ALLEGING AN ILLEGAL TYING ARRANGEMENT MUST FAIL.

Coercion lies at the very heart of a "tie-in" sale. Without coercion, a "tie" does not exist.

In Times-Picayune Publishing Co. v. U.S., 345 US 594 (1953) the Supreme Court observed:

"By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market."

* * * *

"The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of the dominant 'tying' product... " (underscoring ours)

In American Manufacturers Mutual Insurance Company v. American Broadcasting-Paramount Theatres, Inc., 446 F2d 1131 (2nd Cir., 1971), cert. den. 404 US 1063 (1972), the Second Circuit held:

> "But there can be no illegal tie unless unlawful coercion by the seller influences the buyers' choice...Foreclosure (of business to competitors) implies actual exertion of economic muscle, not mere statement of bargaining terms which, if they should be enforced by market power, would then incorporate an illegal tie." (underscoring ours)

In Landon v. Twentieth Century-Fox Film Corp., 384 FS 450 (SD NY, 1974), the Court held:

> "As the Second Circuit had recently held, the exercise of actual coercion by the defendant (as distinguished from mere presence of market power) is a necessary element of an unlawful tying arrangement." At p. 457 (underscoring ours)

In Abercrombie v. Lum's Inc., 345 FS 387 (SD Fla. 1972), the Court held:

> "In order to establish an illegal tying arrangement arising from business conduct, franchisees must prove that they

were coerced, not merely persuaded, into purchasing the product at issue here." (underscoring ours)

The facts in this case show that each plaintiff was visited in her home by a Compact sales agent. Prior to this visit, none of them had even heard of FBP, and none of them had any knowledge of, or interest in any buying service. Each of them was thus solicited by the Compact defendants and did not seek to buy a membership in a buying service. Each of them received a membership in a buying service about whose actual value and about whose actual availability in the market she knew nothing. None of the plaintiffs made an attempt to purchase a membership in FBP either through a Compact sales agent or directly from FBP, without buying the vacuum cleaner. None of the plaintiffs claimed that she was "coerced" into purchasing the vacuum cleaner. Two of them in fact said that they were "persuaded" to purchase the vacuum cleaner. Finally a membership in a buying service is not an item which will affect the financial success of any enterprise; no person need possess it in order to remain in business or to meet competition or to live a comfortable life.* These factors show that the

* Plaintiffs' brief asserts that the bargaining power of the parties was unequal without offering any proof. (At pp. 36,43) It is hard to conceive of how such

plaintiffs were not actually coerced into purchasing the Compact equipment within the meaning of the reported cases and thus no "tie" can exist.

In the usual commercial type "tie-in" case, the Courts have been willing to infer coercion where two products are sold together and certain other factors exist. These factors have been set forth by the Court of Appeals in Capital Temporaries, Inc. v. Olsten Corp., supra, as follows:

> "From this review of the cases we conclude that the plaintiff must extablish that he was the unwilling purchaser of the tied product. If he was not coerced by the economic dominance of the seller, he at least must show that he was compelled to accept the tied product by virtue of the uniqueness or desirability of the tying product, which other competitors could not or would not supply."

Thus where a plaintiff seeks a certain product or service, he must first establish either (a) coercion by means of actual market dominance or (b) the inference of coercion arising from the uniqueness of the product. Both are absent in this case.

A. The Defendants Do Not Possess Actual Market Dominance Over Consumer Buying Services.

Frank Dortch, the Treasurer of FBP defendants (I-67) identified seven (7) consumer

unequal bargaining power could arise given the unessential quality of a membership in a buying service and its general availability.

buying services which compete with FBP in the New York Area. Of the seven all were said to possess greater financial resources than FBP and almost all were said to possess greater membership. Only one of the seven buying services, Better Buying Service of America, Inc., is mentioned by the plaintiffs in their study of the competitors of FBP. (See I-64, Affidavits of Bentley and Stella.) The six which are not mentioned by the plaintiff must therefore be deemed to be competitors of FBP in the New York City Area. One of these six, United Buying Service, Inc., was reported in a Readers Digest article to have 3,000,000 members, 150 times the membership of FBP (51a). The prospectus of another competitor, Unity Buying Service Co. Inc., shows that it has 20 times the members of FBP; it performs the same services as FBP; it is available in the same market as FBP; and it is available at half the cost of FBP. (I-68, Exhibit A)

The "study" mentioned by the plaintiffs in their brief (p. 38, 39) relates to buying services listed in the 1973 New York Telephone Yellow Pages. This "study" contains no response to the affidavit of Frank Dortch (I-67), to the statistics cited by Hyman Sindelman con-

cerning the relative sizes of United Buying Service, Inc. and FBP (51a) and the facts taken from the prospectus of Unity Buying Service.Inc. (I-68, Exhibit A) Thus the plaintiffs' statement (brief p. 39) that FBP "was apparently the only general consumer buying service offered by sale in the New York market" is false and does not reflect the uncontested facts in the record.

B. There Is No Actual Evidence That FBP Is Actually Unique

Nor have the plaintiffs advanced any evidence to show that FBP was actually unique. This is reflected in plaintiffs' brief which fails to describe a single unique attribute of FBP which was not available in any other buying service. (See pp. 8,40-41*)

Since the plaintiffs cannot show actual coercion and cannot meet the test set forth in Capital Temporaries Inc. in order to infer coercion, they propose two other theories in order that the Court may infer coercion and rescue their allegations of a "tie-in" sale.

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*The plaintiffs' brief characterizes FBP as unique in that a one year membership is given away free of charge and competitors cannot match its fraudulent representations. These of course are not attributes of the FBP service at all, but relate to the alleged manner in which memberships were sold.

C. Persuasion May Not Be Substituted For Actual Coercion In Order To Sustain A Tie.

The first of these theories is that "the impression of uniqueness was created in the minds of the consumers by salesmen who represented that the buying plan was 'unique'". (Brief p. 41) Put another way, the plaintiffs claim that they were persuaded by the Compact sales agents into believing that a membership in FBP was valuable and possessed attributes not generally available in any other buying service. Such persuasion has been held not to establish an illegal tying arrangement.

> "In order to establish an illegal tying arrangement arising from business conduct, franchisees must prove that they were coerced, not merely persuaded, into purchasing the products at issue here." Abercrombie v. Lum's, Inc., 345 FS 387 (SD Fla., 1972)

See also American Manufacturers Mutual Insurance Company v. American Broadcasting-Paramount Theatres, Inc. 446 F2d 1131 (2nd Cir., 1971), cert. den. 404 US 1063 (1972) where the Court rejected "bravado" and "bartening ploys" as an alternative to "actual exertion of economic muscle" in order to satify the requirement of "unlawful coercion" and United States v. Loew's Inc., 189 FS 373 (SD NY, 1960)

mod. 371 US 38 (1962) where the Court asserted that the seller has a right "to use arguments to persuade the licensees that it was desirable to purchase the films in blocks or packages rather than individually".

D. Proof That Large Numbers of Purchasers Have Accepted The Tie May Not Be Substituted For Actual Coercion In Order To Sustain A Violation Of Sherman Act, Section I.

The second theory advanced by plaintiffs is that economic power over the tying product may be inferred from the large number of sales made by the Compact defendants in which the membership in FBP and the equipment were "sold" as a package. (Brief pp. 35-36) In support of this position the plaintiffs cite Ungar v. Dunkin' Donuts of America, 1975 CCH Trade Cases, Sec. 60,204 (ED Penn., 1975). Actually Ungar v. Dunkin' Donuts of America, Inc., requires something more than proof that many purchasers were persuaded to buy the package in order for an illegal tie-in sale to result; the purchaser must also prove that the tie was "burdensome" or "uneconomical". At p. 65,765.

No such proof exists in this case. The basis for plaintiffs' claim that the tie was uneconomical consists of a comparison of the selling price of a vacuum cleaner,

floor polisher, vibrator, hair dryer, sudser-shampooer, sprayer and demother (namely $399.00) to the factory cost of the vacuum cleaner and floor-polisher f.o.b. Anaheim California (namely $81.00). (See plaintiffs' brief page 42, note 11.) This comparison does not include the cost of the five unmentioned attachments, the freight cost from Anaheim California to New York City and the high cost of selling door-to-door (51a, 52a). Higher selling costs faced by home solicitation sellers is confirmed by Victor P. Buell, Door-to-Door Selling, 32 Harvard Business Review, No. 3, p. 113. On the other hand the defendants have offered uncontested evidence that the price of the Compact home cleaning equipment compares favorably with those of its competitors who are engaged in home solictations (38a, 51a, 52a, 61a, 73a). This evidence shows that the Compact defendants sold the ATO manufactured vacuum cleaner on a house-to-house basis cheaper than all but one of their competitors. None of this evidence is contradicted or challenged by the defendants. Thus it is clear that

the plaintiffs have failed to raise the issue that the "tie" was burdensome or uneconomical by any affirmative and meaningful evidence.

The plaintiffs argument is not only rejected by the language of the holding of Capital Temporaries, Inc. v. Olsten, supra, but also by its facts. The defendant Olsten Corporation was engaged in the business of supplying temporary personnel to customers. It supplied both "white collar" personnel under the mark "Olsten" and "blue collar" workers under the mark "Handy Andy Labor". These services were supplied in this manner throughout the United States either through Olsten branch offices or through Olsten franchises. One of these franchises was the plaintiff. The plaintiff urged that in order to obtain a license to use the "Olsten" mark and operate the white collar franchise, he was also required to establish and operate a blue collar operation under the "Handy Andy Labor" trademark. Paragraph 40 of the plaintiffs' complaint alleged that the defendant Olsten restrained competition in the blue collar franchise market by requiring its franchises to take the blue collar franchise in order to obtain the white collar Olsten franchise. The Second Circuit found no genuine issue of material fact concerning the defendants' economic

power to restrain competition in the blue collar franchise market and granted partial summary judgment to the defendant dismissing this count.

> "...(T)here is nothing suggested even on appeal that any market study would evidence any dominance by defendant at all, in either the white or blue collar markets, in any relevant area."

Thus the Court in Capital Temporaries rejected the argument that "economic dominance" could be inferred from numbers alone.

In E.B.E. Inc. v. Dunkin' Donuts of America, Inc., 387 FS 737 (ED Mich., 1974) a similar complaint was made. Plaintiff aleged that, as an express condition to obtaining a Dunkin' Donuts franchise, it was required to purchase or lease all necessary operating equipment and space from defendant at inflated prices. The plaintiff's contract was similar to contracts which Dunkin Donuts' other franchisees entered into. The Court granted summary judgment dismissing the complaint holding:

> "From the record established to date in this matter one theme is consistently evident: plaintiff sought and desired a packaged ready-to-go business operation....After careful consideration of the authorities, however, the Court feels that a plaintiff must be able to demonstrate some element of coercion

to establish an illegal tying arrangement."

This Court should also reject a theory which would allow a finding of "economic dominance" from the numbers of contracts entered into containing the "tie".

POINT III

PLAINTIFFS' SECOND CAUSE OF ACTION ALLEGING A PER SE VIOLATION OF SECTION I OF THE SHERMAN ACT DUE TO COMMON LAW FRAUD SHOULD BE DISMISSED AS A MATTER OF LAW.

The plaintiffs' second cause of action alleges a violation of Section I of the Sherman Act arising from the same alleged misrepresentations and fraudulent selling techniques as are the basis of the first cause of action but upon a theory that interstate trade is restrained and free competition destroyed by such acts. This cause of action is nothing more than a count in common law fraud clothed in antitrust dress.

The effect of the plaintiffs' second cause of action would be to extend the antitrust laws to serve as a vehicle for redressing tortious business

practices. This has never been its purpose.

In Parmelee Transportaion Co. v. Kieshin, 292 F2d 794 (7th Cir., 1961), the Court held:

> "However, the use of conventional antitrust language in drafting a complaint will not extend the reach of the Sherman Act to wrongs not germane to that act, even though such wrongs be actionable under state law. We are not concerned with labels. Otherwise, an adroit antitrust lawyer might use his skill in the use of words to convert many unlawful acts into antitrust violations. The anti-trust laws were never meant to be a panacea for all wrongs."

In Norville v. Globe Oil & Refining Co., 303 F2d 281 (7th Cir., 1962), the Court found that the claims advanced by plaintiff amounted to "overreaching, imposition and fraud in a business transaction". Summary judgment was granted to the defendant dismissing the complaint because the matter came

> "under the jurisdiction of the State Court and does not invoke the Federal Law in any way."

See also 15 Antitrust Bulletin, 361 at p. 365 (1970) and 98 Yale Law Journal 949 at p. 950.

Similarly this Court should not permit the plaintiffs to clothe a common law fraud in a business transaction with an antitrust violation.

CONCLUSION

The Order of the District Court dated March 5, 1975 and the judgment entered thereon should be affirmed.

Respectfully submitted,

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